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Issue Date: 14 January 2003

Case Nos. 2001-LHC-2440
2001-LHC 2441
2001-LHC-2442

OWCP Nos. 01-151489
01-151488
01-149866

In the Matter of

MICHAEL J. KISH,
Claimant,

v.

BATH IRON WORKS CORP.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

APPEARANCES[1]:

Marsha Cleveland, Esq.
Cleveland & Chowdry
Topsham, Maine
For the Claimant

Stephen Hessert, Esq.
Norman, Hanson & DeTroy
Portland, Maine
For the Employer

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[1] The Director, Office of Workers' Compensation Programs, did not appear and was not represented by counsel at the hearing.

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

These consolidated cases arise from claims for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (herein after referred to as either LHWCA or the Act).

Following proper notice to all parties, a formal hearing in this matter was held before the undersigned on April 18, 2002, in Portland, Maine. All parties were afforded full opportunity to present evidence as provided in the Act and the Regulations issued thereunder and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX 1 and 2, EX 1 through 37 and CX 1 through 24 pertain to the exhibits admitted into the record and offered by the Administrative Law Judge, the Employer and the Claimant, respectively. EX 22 was withdrawn from the record at the request of counsel for the Employer. The Transcript of the hearing is cited as "TR" followed by page number.

At the hearing, counsel for the Employer requested additional time to respond to exhibits that were faxed to him on the previous night. Specifically, the Employer requested that it be allowed to schedule a post-hearing psychiatric examination and that the record remain open so that evidence resulting from the examination could be admitted. Counsel for the Claimant did not object and further stated that since the Claimant recently moved, the record should stay open for additional time to do an updated labor market survey. For these express purposes, I granted the Employer's motion and kept the record open for an additional sixty days.

Stipulations

A. KNEE INJURY

The parties have stipulated as follows:

1. The Claimant sustained a left-knee injury on November 12, 1998;

2. The injury arose out of and in the course of his employment at Bath Iron Works ("BIW");

3. The average weekly wage on this date of injury is $773.04;

4. The Act applies; and,

5. The claim was timely brought and controverted.

B. HAND, ARM, AND SHOULDER INJURY

The parties have stipulated as follows:

1. The Claimant sustained an injury involving his upper extremities on May 15, 2000;

2. The injury arose out of and in the course of his employment at BIW;

3. The average weekly wage on this date of injury is $645.81;

4. The Act applies, and,

5. The claim was timely brought and controverted.

C. STRESS/ PSYCHOLOGICAL INJURY

The parties have stipulated as follows:

1. The Claimant alleges a stress claim on November 17, 2000;

2. The average weekly wage on this date of injury is $645.81;

3. The Act applies; and,

4. The claim was timely brought and controverted.

(TR 13-14)

Issues

The remaining issues to be resolved are:

1. Whether the Claimant's on-going symptoms are work-related;

2. Whether the Claimant's stress and emotional issues are work-related;

3. Whether the Claimant has a work capacity; and,

4. Whether the prescription for OxyContin is reasonable and necessary.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Claimant, Michael Kish, is a 40-year old high school graduate who was hired by Bath Iron Works ("BIW") on October 13, 1986[2]. (TR 17; 29) Prior to coming to BIW, the Claimant served in the Navy for four years. (TR 30) As a naval officer, he was an interior communications electrician and dealt with alarm, navigation, and electrical equipment. He earned four certificates in the Navy for the completion of various courses, including an eight-week program on electronics and electricity, a six-week program on interior communication electrician work, a wholesale maintenance class on ordering supplies and a Dimension 2000 PBX telephone exchange class. (TR 31) After he was honorably discharged from the Navy, the Claimant performed general construction work at the Long Air Force Base in Limestone Maine for approximately three months. This job primarily involved renovation work, replacing doors and windows. (TR 32) The Employee was then hired by J. M. Huber Company, a plywood processing plant, as a chip machine operator. (TR 17, 33)

[2]The Transcript reports that the Claimant began work on October 13, 1996. This is inconsistent with the record. The Claimant reported to Dr. David Bourne that he began employment with BIW on October 14, 1986. The Claimant also submitted a pre-placement medical questionnaire to BIW on September 25, 1986. Accordingly, I find that the date noted in the transcript is incorrect and that the Claimant began employment at BIW in 1986.

The Claimant was hired at BIW as a marine electrician. (TR 17) Primarily, he worked on board the vessels that were being constructed wire checking circuits, installing heat and smoke detectors, maintaining connection boxes and building, and repairing and maintaining systems. The Claimant testified that at least fifty percent of his day was working at eye level and at least eighty percent of the equipment he installed required fine motor skills. (TR 19)

The Claimant has reported three separate injuries. The first injury was to his left knee in 1998. The Claimant was working in the berthing area and was moving from one berthing up through an escape shuttle to another berthing. While passing through the opening of the escape scuttle, he hit the top of his left knee against the underside of the hatch opening. (TR 21)

The Claimant also claims injury to his hands, wrists, arms and shoulders. He testified that he started experiencing numbness, cramping, and discomfort in his hands in 1995. When he reported his symptoms to the Employer's medical clinic, they referred the Claimant to Dr. Vigna for testing. At that time he was diagnosed with early signs of bilateral carpal tunnel syndrome. The Claimant initially attempted physical therapy for six weeks. When the symptoms did not diminish, the Claimant returned to work for another two years. In 1997, the Claimant opted for carpal tunnel surgery on both hands. The Claimant was put on light duty for a few months following the surgery. In January of 1998, the doctor released him to regular duty. Thereafter, the Claimant performed his regular duties as an electrician until December 13, 2000. (TR 21-22)

Following the surgeries, the Claimant testified that the numbness condition in his hands ceased. However, he continued to have cramping, stiffness, weakness and pain in his hands. The pain would extend from his hands up to his shoulders. The Claimant first felt the discomfort in his shoulders in early 2000. By July of 2000, the discomfort had worsened into a pain that was aggravated by opening and closing the hatches. (TR 23-25)

The last injury claimed by the Claimant is dated November 17, 2000, and relates to stress and depression stemming from his other injuries and the treatment he received at BIW. The Claimant testified that he felt unable to turn to anyone and felt stress from being unable to perform his job functions on a daily basis. The Claimant began to see Dr. Dettmann, a psychiatrist, referred by the Claimant's primary physician, in early 2001. (TR 26-27)

The Claimant is currently taking the following medications: Ziac for high blood pressure; Prilosec for acid reflux disease; Ambien for sleeping; Effexor for stress and depression; Naputone, an anti-inflammatory; and OxyContin for pain. He testified that the OxyContin relieves roughly sixty percent of his pain. (TR 28)

Injury and Medical Evidence:

A. KNEE INJURY

The parties have stipulated that the Claimant sustained a left knee injury on November 12, 1998. However, the record shows that on April 28, 1994, the Claimant was diagnosed with left knee patellofemoral pain and lateral hamstring tendonitis. The physical therapist, Denise Dumont-Flores, noted a date of injury of January 5, 1994 and stated that the Claimant reported a pop in his left knee when he was climbing and carrying a 50 pound tool bag at BIW. The Claimant received a total of nine physical therapy treatments for this injury. The Claimant appeared to improve during his therapy. By June 2, 1994, the Claimant reported that his knee was feeling much better. Thereafter, the physical therapist discharged the Claimant to a home exercise and stretching program. (CX 16)

On December 12, 1998, the Claimant reported a knee injury resulting from "climbing up a vertical ladder... as I was going through the scuttle I hit my left knee causing me some pain." Contrary to the stipulated date, the Claimant himself noted the date of injury as December 12, 1998. The Claimant was seen by BIW's on-site clinic, which recommended ice and Ibuprofen. (CX 20)

On November 29, 2000, the Claimant was seen by Wayne McFarland, NP, for assistance with his left knee pain. The Claimant stated that his primary care physician would not treat him because he said it was a "workers comp" problem. He also stated that he had chronic knee pain since the early 1990s, however, it had seemed to increase significantly of late. Climbing and kneeling seemed to be most painful. Upon examination and x-ray, Mr. McFarland stated that the knee was grossly normal, range of motion is full, however there is pain upon compressing the patella. In sum, he diagnosed the Claimant with chronic left knee pain following trauma. Mr. McFarland also issued a limitation for the following two weeks stating "no kneeling, crawling, squatting; minimal climbing stairs and ships ladders, no vertical ladder climbing." (EX 23) Mr. McFarland conducted a follow-up examination on December 13, 2000. (CX 20)

An MRI was performed on the Claimant's left knee on December 21, 2000. The scan showed the following: 1) normal lateral

meniscus; 2) no definite medial meniscal tear but there is a suggestion of a radial tear of the posterior horn of the medial meniscus on coronal imaging; 3) early changes of chondromalacia patella; and 4) intact ligaments. (CX 14)

On January 10, 2001, the Claimant was examined by Dr. Paul R. Cain and Elizabeth M. Hulsey, PA-C after complaining of left knee pain. Specifically, the Claimant's symptoms included popping and stiffness in the knee, difficulty going up and down stairs, and pain resulting from sitting for long period of time. A physical examination as well as x-rays led both doctors to diagnose left knee patellofemoral pain secondary to chondromalacia. No opinion as to the etiology of the knee pain was stated. In a letter dated January 18, 2001, Dr. Cain opined that the Claimant will have permanent restrictions on his knees. These restrictions include the inability to stand for more than four hours a day and to walk for more than two hours. Dr. Cain also stated that the Claimant would probably be unable to perform stooping or kneeling activities. A subsequent visit occurred on December 21, 2001. The Claimant stated that his knee pain had worsened and that the pain radiated up and down his left leg. Dr. Cain reiterated his prior findings and noted that operative procedures probably would not improve his pain. (CX 10)

On August 3, 2001, Dr. Michael Mainen examined the Claimant based on multiple complaints related both to his arms and left knee. Dr. Mainen noted that the Claimant's left knee complaint arose directly from a workplace accident. Dr. Mainen disagreed that the knee injury was restricting, but agreed that the Claimant's residual knee symptoms are related to the disturbed patellofemoral function that resulted from the blow on the knee at work. As far as the impact of the injury, Dr. Mainen pointed out that many of the Claimant's symptoms are psychosomatic and a result of his chronic pain syndrome. Dr. Mainen stated that if the Claimant was to find some occupation that he found gratifying, then his symptoms would resolve. In commenting on the Claimant's work capacity, Dr. Mainen said there should be some limitations on activity with the left knee since his patellofemoral syndrome could be uncomfortable with excessive kneeling. The Claimant should minimize squatting but Dr. Mainen stated that it did not have to be proscribed entirely. Dr. Mainen also stated that he should avoid jobs with frequent stairs climbing throughout the day, but that the Claimant was certainly fit for eight hours a day on his feet. (CX 19)

B. HAND, ARM, AND SHOULDER INJURY

Dr. Bernard P. Vigna, Jr., saw the Claimant on April 13, 1995. He recorded a one year history of bilateral hand symptoms which gradually progressed and consisted of pain at the wrists and palms which had begun to radiate in a shock-like pattern up to the elbow on the left. Dr. Vigna diagnosed the Claimant with bilateral carpal tunnel syndrome and noted that the syndrome was likely a result of repetitive use of the hands. (CX 13) On April 20, 1995, Wayne McFarland issued limits through June 1, 1995, of "limited gripping, pushing and pulling; no overhead or vibratory tools." (CX 20)

On August 8, 1995, an MRI was taken of the right shoulder. The MRI was normal, showing no increased signal or inflamation. The rotator cuff also appeared normal. (EX 27)

During 1999, the Claimant was routinely examined by Dr. Robert Sylvester regarding complaints of discomfort in his hands. The Claimant had tenderness in MCP joints and both wrists. Elbow and shoulders were noted as good. Dr. Sylvester also noted that the Claimant had decreased strength in both hands. Dr. Sylvester stated the following impressions: 1) history of bilateral carpal tunnel syndrome with surgery; 2) history of sleep apnea; 3) history of hypertension; 4) history of hyper cholesterolemia; 5) history of depression; and 6) pain in the PIP joints and wrists. On December 16, 1999, Dr. Sylvester noted that a bone scan showed increased activity on his hands, knees, ankles, and wrist metacarpal joints in the second and fourth digits on the left and the third digit on the right. Dr. Sylvester stated that he thought this may be related arthritis rather than a job-related injury. (CX 9)

The Claimant was routinely examined by Dr. Hector J. Rosquete. Dr. Rosquete stated that the Claimant had mild bilateral carpal tunnel syndrome. On September 26, 1997, Dr. Rosquete performed an operation, known as a carpal tunnel release, on the Claimant's left upper extremity. He also opined that the Claimant's symptoms were exacerbated by doing construction work. In 1999, the Claimant began complaining that the pain and stiffness from his hands extended halfway up the forearms on both sides. At that time, the pain did not affect his shoulders or elbows. (CX 11)

The Claimant visited Dr. Rosquete on April 24, 2000. Dr. Rosquete noted that the Claimant was very frustrated. He complained of persistent discomfort, pain, and deterioration of strength and mobility in his hands. Dr. Rosquete noted that upon physical examination the Claimant demonstrated no atrophy. Additionally, the Claimant complained of pain over the dorsal

aspect of the forearm and a burning-like sensation into the left thenar eminence. The final impression noted: "The patient continues to have persistent upper extremity pain and discomfort, etiology unclear." (CX 11)

A report from Dr. Rosquete dated August 7, 2000, stated that the Claimant has persistent discomfort in his upper extremities. The Claimant described the pain as a toothache-like sensation over the ulnar and radial borders of the forearm. The Claimant reported that he had problems working on the ship and felt that any activity caused constant pain. Dr. Rosquete noted that the Claimant found this frustrating. (CX 11)

A report dated May 27, 1997, written by Dr. Douglas Pavlak, reiterated the diagnosis of carpal tunnel syndrome and noted that the Claimant's carpal tunnel syndrome would be characterized as mild on the left and moderate on the right. There was no evidence of extensive axonal degeneration from the electrophysiologic testing. Dr. Pavlak submitted a report dated April 16, 1999 reiterating these findings and noted that the Claimant did not have significant early osteoarthritis. Specifically, Dr. Pavlak stated, "The one thing I can reassure you ... is that there really is no significant evidence or suggestion of recurrent carpal tunnel syndrome or any other peripheral nerve entrapment that would explain his symptoms." On May 10, 2000, Dr. Pavlak again stated that despite continued complaints of pain, there is no evidence of recurrent carpal tunnel syndrome, however, the Claimant may have an element of tenosynovitis. On August 8, 2000, in a letter to the Claimant, Dr. Pavlak opined that his continued pain is still work-related, stating, "It is not unusual for patients who go back to very hand intensive work to get recurrent symptoms and I think that your case represents no exception to this." Likewise, in a report dated February 6, 2001, Dr. Pavlak stated, "The [musculoskeletal diagnoses] that appear to be likely related to his work are his residual upper extremity pain which is most certainly due to overuse tenosynovitis and some element of medial epicondylitis. These are all cumulative trauma disorders and likely related to his work as an electrician at BIW." In conclusion, he states "It would seem clear that [the Claimant] is not likely able to go back to that kind of work unless he is given some alternative type of duties or modified duties." (CX 15)

In 2001, Dr. Pavlak prescribed OxyContin as relief for the Claimant's pain. Dr. Pavlak stated that about 50 percent of his pain has been relieved through the use of OxyContin. However, only one year earlier, on May 18, 2000, Dr. Pavlak stated that reasonable treatment could be as simple as a modification of his

job and getting him involved in less repetitive activities of the hands if he continues the same work. (EX 26)

The Claimant was examined by Dr. Lee G. Kendall, Jr., on March 30, 2000. After reviewing the Claimant's medical history and giving a physical, musculoskeletal, and neurological exam, Dr. Kendall concluded, "[Claimant's] not having a great deal of active synovitis that I can tell and I am not convinced that this is an inflammatory arthropathy such as rheumatoid arthritis." Dr. Kendall did note that the Claimant has bilateral hand pain and stiffness. The Claimant was also x-rayed on this date. Dr. J. Bennett stated that the x-rays showed no acute pathology and no osteoarthritic changes, however there was an apparent mild narrowing of the second and third MCP joint spaces and the radiocarpal joint space which suggests the possibility of a rheumatoid type arthritis. (CX 17)

On December 5, 2000, the Claimant saw Dr. Marc Miller for an independent medical examination. Based on his examination and the Claimant's medical history, Dr. Miller stated the following:

> I do not see evidence for an arthritis; either an inflammatory arthritis or degenerative arthritis. I believe that his pain is coming from soft tissue structures including muscles and tendons. He really has chronic pain syndrome and there may be contributing factors including depression, obesity, poor sleep habits, by his history it sounds like his type of work also aggravates his musculoskeletal symptoms.

(CX 18)

A medical examination was performed by Dr. Michael W. Mainen on August 3, 2001. Based on a physical examination and the full medical history, Dr. Mainen stated that the Claimant had a history of bilateral carpal tunnel syndrome which would be considered work-related, but this conclusion was said to be drawn more based on epidemiologic data than evidence. He also stated that at surgery there was a report of thickening of the tenosynovium. Dr. Mainen attributed this to work activities, saying, "if there isn't any other obvious cause, such as a wrist fracture or rheumatoid arthritis or a disease associated with carpal tunnel syndrome such as amyloidosis, then the presumption is that work activities played at least a significant contributing role." However, Dr. Mainen opined that the majority of the patient's symptoms, such as the shoulders, the arms and at times the ankles, are not work related.

No identifiable pathologic condition is present which would cause the symptoms exhibited. Instead, these symptoms result from the Claimant's chronic pain syndrome. Dr. Mainen also disagreed with any diagnosis of arthritis. He stated that there are no physical signs of synovitis and the symptoms are not those of arthritis. As far as work capacity related to his hand and arm complaints, Dr. Mainen stated that there is no evidence to suggest that the Claimant is at risk of harming himself from any physical activity which he should choose to engage. (CX 19)

C. STRESS/PSYCHOLOGICAL INJURY

The Claimant contends that his stress claim dates back to events in the early 1990's when he felt he was unfairly treated by supervisors and ridiculed by co-workers. He claims to have reported these events to the BIW Industrial Health Department and his shop steward. At that time, he seriously contemplated suicide. (Claimant's Brief, 3)

The first reference to the Claimant's psychological condition in the medical records occurred on August 8, 1997. The Claimant initially expressed his concern regarding his significant temper and his desire to treat it with Dr. Kahn. The Claimant also showed Dr. Kahn a videotape of a 20/20 episode on people with uncontrollable anger. The Claimant stated that the depiction on the videotape "fit [him] to a tee." Dr. Kahn prescribed Paxil as an attempt to control the Claimant's temper. On March 26, 1999, the Claimant requested an increase in Paxil from 30 to 40 milligrams. Dr. Kahn agreed to alter his original prescription.

On June 8, 2000, the Claimant saw Dr. Kahn with numerous concerns related to difficulties in the workplace, his marriage, and his temper. The Claimant noted that he had more difficulty controlling his mood and believed that Paxil was no longer effective. The Claimant was also very concerned about his marriage and requested marriage counseling. Dr. Kahn determined that the Claimant should switch from Paxil to Celexa. On November 17, 2000, the Claimant saw Dr. Kahn and began crying uncontrollably when talking about his frustration concerning the treatment he has received, the alienation he feels from other employees, and the constant pain he has endured. Dr. Kahn recommended to the Claimant that he seek immediate psychiatric care and referred the Claimant to Dr. Dettmann. (CX 12)

Dr. Dettmann began treating the Claimant for major depressive disorder. Dr. Dettmann's notes show that the major stressors in the Claimant's life included problems in his marriage and the litigation surrounding his injuries. Additionally, the record

shows that the Claimant's wife is also on anti-depressant medication and receiving disability benefits. The majority of conversations concerned problems surrounding his marriage and financial stressors. Dr. Dettmann also notes that the Claimant began taking OxyContin for his somatic and physical chronic pain. The Claimant at this time used Effexor, an antidepressant, as well as Ambien for insomnia. (EX 23) Dr. Dettmann gives no opinion as to whether the Claimant's depression is work-related or the Claimant's current work capacity.

One particular session, February 5, 2001, is of interest as the Claimant talked about his depression concerning his disabilities and the financial issues surrounding his work related injuries. The Claimant contended that his hands are very weak. Additionally he stated that he lost everything, including his health, working for BIW. He reported being very hopeless about his future, even to the point where he would shoot himself if he had a gun in the house. (EX 23)

The Claimant met with Dr. David J. Bourne on July 31, 2002, for a five hour session. Additionally, Dr. Bourne reviewed the Claimant's medical history and transcript of the oral hearing. The Claimant attributed his depression to the difficulties he had while working with BIW. Specifically, the Claimant stated that he felt that other employees mistreated and avoided him and his supervisor assigned him to unskilled partners so he was not able to get his raises. The Claimant also attributed his depression to his physical difficulties, his loss of earning power, and his pain. With regard to family issues, the Claimant stated that there were minor family stresses but none that were serious. The Claimant was evicted from his apartment that he had lived in for over fifteen years and found this experience very stressful and felt considerable rage towards his landlord. Additionally, the Claimant's son and youngest daughter had been difficult to control.

Dr. Bourne concluded that the Claimant suffers from major depressive disorder since the mid 1990s. He also opined that the treatment which the Claimant received was appropriate. Dr. Bourne noted that the Claimant underestimated the importance and contribution that his family issues has on his depression. Specifically, Dr. Bourne concluded:

> Mr. Kish's depression and psychological difficulties are longstanding ... It is probable that there are developmental and familial issues which have caused Mr. Kish to have personality difficulties. He tends to externalize and blame others for his problems

> ... He likely tends to exacerbate situations and increase friction, although he perceives the opposite. These tendencies intensify his depression. I have diagnosed a personality disorder NOS with narcissistic features.
>
> Michael Kish's depression is related to a host of issues in his life. I believe that the problems with his children have contributed significantly. His perception of friction and mistreatment by co-workers likely has contributed to dysphoria. These assertions concerning co-workers have not been objectively substantiated, to the best of my knowledge.
>
> I do not think that the physical problems have objectively caused Mr. Kish's depression, although they likely interface with his depression and may be exacerbated by it. I think that it is likely that the depression causes Mr. Kish to experience increased physical distress, and an increased focus on his problems, through the process of somatization. I do not think that the limitations caused by the knee complaints in turn exacerbate the depression. If there is significant ongoing impairment resulting from wrist injuries, then there is no ongoing connection between his depression and the injury.

Lastly, in regards to the Claimant's present work capacity, Dr. Bourne stated:

> Given Mr. Kish's affective lability, anger and depression, I do not think that he is currently psychiatrically able to work consistently ... Given his current psychological condition, I do not think that Mr. Kish is ready to resume work or to participate in a job search. I think that the psychiatric limitations are unrelated to his work injury.

(EX 38)

Labor Market Survey:

The record contains a labor market survey dated November 20, 2001 and an attached update dated April 26, 2002. (EX. 19) This survey was conducted by Arthur M. Stevens, Jr., CDF utilizing data collected from January 1, 2001 through November 20, 2001, and from March 1, 2002 to April 26, 2002. The initial survey encompasses the greater Lewiston, Auburn, Bath, Brunswick, Portland and Augusta areas. However, due to the Claimant's move to Fort Fairfield, these jobs are no longer within a reasonable commuting distance. The update focuses on the greater Fort Fairfield, Presque Isle, and Caribou areas, all of which are within 50 miles of the Claimant's home. At the time the updated survey was performed, the Claimant was thirty nine years old. When looking for employment for the Claimant, Mr. Stevens considered the following restrictions: light duty work; no lifting or carrying of more than 10 pounds on a regular basis and 20 pounds occasionally; no repetitive use of the hands, wrists, or forearms; no vibrating or pneumatic equipment; refrain from use of the arms above eye or shoulder level to any extensive degree but he could certainly reach up from time to time; and avoid kneeling, deep knee bending or extensive stair climbing. Mr. Stevens found twenty six different positions available. Based on the positions, Mr. Stevens opines that it is reasonable to expect that the Claimant could make at least six to eight dollars in any entry-level position.

Arising Out of Employment:

The Claimant must initially establish a *prima facie* case that he suffered an injury. To do so, he must show he suffered an injury and, that either a work-related accident occurred or that working conditions existed which could have cause or aggravated that injury. Kelaita v. Triple Machine Shop, 13 BRBS 326, 330-331 (1981) See also Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988); Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990); Perry v. Carolina Shipping Co., 20 BRBS 90 (1987). In presenting his *prima facia* case, the claimant is not required to introduce affirmative medical evidence that the working condition in fact caused his harm; rather, the claimant must show that working conditions existed which could have caused his harm. See generally U.S. Industries/Federal Sheet Metal, Inc., 455 U.S. at 608, 14 BRBS at 631. An "Injury" is defined in Section 2(2) of the Act in pertinent part as an "accidental injury. . . arising out of or in the course of employment." 33 U.S.C. 902(2).

If a *prima facie* case of injury is established, the claimant is aided by a presumption pursuant to Section 20(a) of the Act that the "injury arose out of and in the course of employment." Kelaita,

supra at 329-331; See also Wheatley v. Alder, 407 F.2d 307, 312 (D.C. Cir. 1968). The burden then shifts to the employer to produce "substantial evidence to rebut the work-relatedness of the injury." Volpe v. Northeast Marine Terminals, Inc., 671 F.2d 697, 700 (2nd Cir. 1982), *citing* Del Velcchio v. Bowers, 296 U.S. 280, 285 (1935). In this context, "substantial evidence" has been considered to be "specific and comprehensive evidence sufficient to sever the potential connection between the injury and the employment." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1083 (D.C. Cir. 1976), *cert. denied* 429 U.S. 820 (1976). After the presumption has been rebutted, the competent evidence must be considered as a whole to determine whether an injury has been established under the Act. Id.; Volpe, 671 F.2d 700; Cairns, 21 BRBS 252 at 254.

Additionally, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812(9th Cir. 1966); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

Once the Claimant has availed himself of the presumption, the burden then shifts to the Employer to rebut the presumption with substantial evidence. The Board has held that the Section 20(a) presumption may be rebutted with evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1083 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Thus, the relevant inquiry is whether the Employer's evidence can establish the lack of a causal connection between the Claimant's condition and his employment. Dower v. General Dynamics Corp., 14 BRBS 324 (1981).

A. KNEE INJURY

I find that the medical evidence in the record supports a finding that the Claimant did suffer from an injury to his knee which arose out of and in the course of his usual employment. The Claimant testified to hitting the top of his left knee on the underside of the hatch opening. The Employer has stipulated that the injury is work-related. Accordingly, I find that the Claimant suffered from a work-related injury to his left knee.

B. HAND, ARM, AND SHOULDER INJURY

As to the injury reported relating to the Claimant's carpal tunnel syndrome and pain in his upper extremities, I find that the medical evidence in the record supports a finding that the Claimant

suffered a work related injury. Every doctor in the record diagnosed or agreed with the initial diagnosis that the Claimant has bilateral carpal tunnel syndrome. Drs. Rosquete, Pavlak, and Mainen all state that carpal tunnel syndrome is considered work related. Additionally, the Employer has stipulated that the injury is work-related. As this stipulation is consistent with the evidence of record, I find that the Claimant suffers from a compensable work-related injury to his hands and upper extremity.

In contrast, the Employer has not stipulated concerning whether the shoulder injury is work related. However, based on the evidence as a whole, I find that the Claimant has satisfied the injury prong of his *prima facie* case relating to the alleged shoulder injury. The Claimant contends that he has experienced constant pain from his hands all the way up to his shoulders. He testified that he first began to experience shoulder pain early in year 2000, particularly when opening and closing the hatches. BIW's on-site medical facility reports that the Claimant complained of shoulder pain consistently from November 2000 onward. Additionally, Dr. Pavlak has diagnosed the Claimant with shoulder impingement syndrome and has stated that this condition is work-related. Accordingly, I find that the Claimant has satisfied the injury prong of his *prima facie* case relating to the Claimant's shoulder injury.

However, the Claimant must also establish that the shoulder injury occurred in the course of employment or that conditions existed at work which could have caused the actual injury. Dr. Pavlak noted in his deposition that the Claimant's shoulder problem likely developed close in time to when he saw the Claimant in February 2001. The Claimant last worked at BIW in December of 2000. Therefore, Dr. Pavlak admitted that the separation in time would make it more likely than not that his shoulder problem was not caused or aggravated by the Claimant's work at BIW. The Claimant is unable to state with any certainty how his shoulder was injured. Additionally, the Claimant does not set forth any theories as to how the injury could possibly have occurred.

The Claimant alternatively argues that the shoulder injury is causally linked to the work related hand injury in that it is a result of his chronic pain syndrome, which is related to the hand and knee injuries. Dr. Pavlak describes chronic pain syndrome as:

> A syndrome of behavior that is out of proportion to the diagnoses that would cause the pain in the first place... It's a behavioral syndrome that- that basically makes a person very dysfunctional above and beyond

> what we would expect simply the diagnoses themselves to cause.

(CX 25 p. 20-21) Dr. Pavlak testified that most chronic pain syndrome patients have an underlying organic diagnosis:

> [I]t starts, so to speak, with the original injury or pain problem and then it begins to snowball when that pain and the resultant dysfunction begins to lead to other things such as loss of job, loss of income, spouse or family trouble as a result of that, depression, dysfunction within the family.

Dr. Pavlak views the Claimant's chronic pain syndrome as an outgrowth of the hand and arm injury, which he considers to be the dominant problem.

In contrast, Dr. Mainen states that the chronic pain syndrome goes beyond the original problem and is exclusively the cause of the Claimant's shoulder pain. Dr. Mainen further opines that the Claimant's work-related injuries did not produce the chronic pain syndrome, rather the pain syndrome amplified the organic injuries. This opinion is based on the fact that the pain complained of has nothing to do with the areas injured. Instead, Dr. Mainen opined that the chronic pain syndrome arose out of his personality. Dr. Mainen also stated that depression was a contributing factor that led to his pain syndrome or somatization disorder.

Dr. Marc Miller conducted an independent medical exam. He found no evidence for either inflammatory arthritis or degenerative arthritis. He stated that the Claimant has chronic pain syndrome and there may be contributing factors including depression, obesity, and poor sleep habits. Dr. Miller also stated that based on the Claimant's history, it appears that his type of work also aggravated his musculoskeletal symptoms.

The Claimant suffers from chronic pain syndrome and a work accident occurred. Thus, the Claimant is entitled to Section 20(a) presumption that these conditions are causally related to his employment. However, I find that the Employer has submitted substantial evidence to rebut the presumption in the form of Dr. Mainen's testimony. Accordingly, the presumption no longer controls and the issue of causation must be resolved on the record as a whole.

Based on the evidence of the record, I find that the Claimant's development of chronic pain syndrome is related to his

employment, specifically his employment related psychological injury. Both Dr. Pavlak and Dr. Mainen stated that depression and stress are contributing factors which led to the chronic pain syndrome. An employment related injury need not be the sole cause or primary factor in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Rajotte v. General Dynamics Corp., 18 BRBS 85(1986). I find that the Claimant's work-related depression is a contributing factor to his chronic pain syndrome. Therefore, I find that the Claimant's shoulder problem is a compensable work related injury under the Act.

C. STRESS/PSYCHOLOGICAL INJURY

The Employer has not stipulated concerning whether the psychological injury is work related. Initially, I find that the Claimant has established the existence of an injury relating to the Claimant's depression and psychological conditions. Reports of both Drs. Dettmann and Bourne relate that the Claimant spoke of incidents at work, his injury, the way he was treated surrounding his injury, the resulting financial stress, and the loss of self-worth from being out of work. The Claimant attributed these factors to his depression. Dr. Bourne also concluded that his perception of friction and mistreatment by co-workers has likely contributed to his depression. Even though Dr. Bourne found other stressors to be more dominant sources of depression, the additional aggravation caused by work-related incidents is sufficient to be considered a work-related injury. Accordingly, I find that the Claimant has satisfied the injury prong of his *prima facie* case relating to the psychological injury.

As to the second prong of his *prima facie* case, I also find that the Claimant has established that the psychological injury occurred in the course of employment, or conditions existed at work which could have caused the harm or pain. The Claimant told both Drs. Dettmann and Bourne of the mistreatment he felt occurred at work and how that contributed to his depression. He also explained how his pain and inability to work added to his depressive symptoms. Accordingly, I find that the Claimant has shown that a working condition existed which could have caused or aggravated his psychological injury. I therefore conclude that work-related incidents relating to the Claimant's psychological injuries are sufficient to invoke the 20(a) presumption.

Upon reviewing the evidence offered by the Employer, I do not find it sufficient to break the connection between the Claimant's existing depression and the work-related conditions that the

Claimant was subject to. The Employer offers the deposition of Dr. Bourne. (EX 29) Dr. Bourne states that the Claimant's injuries do not contribute to his depression, rather it is more likely that his depression exacerbates his injuries. Dr. Bourne also stated that the Claimant attributes his depression to a history of difficulties in the workplace and his physical difficulties. Rather than ruling out these factors, Dr. Bourne merely states that the Claimant underestimates the importance and contribution of other major issues in his life. Even if the Claimant's treatment at the workplace is only a factor which aggravates his depression, rather than the cause of his depression, the Claimant has still suffered an injury under the Act. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812(9th Cir. 1966); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Therefore, Dr. Bourne's opinion is not substantial evidence to rebut the presumption.

Accordingly, I find that the evidence offered by the Employer in this case is insufficient to rebut the presumption of compensability found at Section 20(a). Therefore, I find that the Claimant suffered a compensable psychological injury arising out of his employment.

Nature and Extent of Disability:

Disability under the Act is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). The Claimant has the initial burden of proving total disability, as well as the burden of proving that the disability is permanent. Eckley v. Fibrex and Shipping Co., 21 BRBS 120 (1988). To establish a *prima facie* case of total disability, the Claimant must prove, by a preponderance of the evidence, that he cannot return to his regular or usual employment due to his work related injury. The Claimant need not establish that he cannot return to any employment, rather only that he cannot return to his usual employment. Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). If the Claimant satisfies this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II), 19 BRBS 171 (1986).

The standards for determining total disability are the same regardless of whether temporary or permanent disability is claimed. Bell v. Volpe/Head Construction Co., 11 BRBS 377 (1979). The Act defines disability in terms of both medical and economic considerations. Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992). The degree of the Claimant's disability, i.e. total or partial, is determined not only on the basis of physical condition, but also on other factors, such as age, education,

employment history, rehabilitative potential and the availability of work. Thus, it is possible under the Act for a claimant to be deemed totally disabled even though he may be physically capable of performing certain kinds of employment. New Orleans (Gulfwide) Stevedore v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981).

A. KNEE INJURY

Upon review of the medical evidence, which is discussed in detail above, I find that the preponderance of such evidence is sufficient to establish a *prima facie* case of total disability as a result of the knee injury that occurred on November 12, 1998.

On December 13, 2000, Wayne McFarland, a nurse practitioner, issued the following two week limitation: no kneeling, crawling, or squatting; minimal climbing stairs and ship ladders; and no vertical ladder climbing. The Claimant reported that following this evaluation, the foreman put the Claimant out of work since there was no available work within his limitations.

Dr. Cain, in a January 18, 2001 letter, opined that the Claimant has permanent limitations with regard to his employment as a result of his knee injury. Dr. Cain stated that the Claimant will have permanent restrictions which include the inability to stand for more than four hours a day and to walk for more than two hours. Dr. Cain also stated that the Claimant would probably be unable to perform stooping or kneeling activities.

On August 3, 2001, Dr. Mainen stated that many of the Claimant's symptoms are psychosomatic and would resolve if the Claimant found an occupation that he found gratifying. Despite this observation, Dr. Mainen did say that there should be some limitation on activity such as minimizing squatting and climbing stairs throughout the day, as it may be uncomfortable for the Claimant. He concluded that the Claimant was certainly fit for eight hours a day on his feet. Dr. Mainen repeated this opinion in his deposition, testifying that based upon the complaints of pain, the Employee had a 7 percent permanent impairment under the 5th Edition of the AMA Guides which would translated to a 3 percent whole-person impairment for that particular lower extremity problem. (EX 37 at 14)

On February 6, 2001, Dr. Pavlak evaluated the Claimant and stated the following limitations as a result of his knee injury: avoid kneeling, deep knee bending, or extensive stair climbing. (EX 25)

As noted above, to establish total disability, the Claimant must establish, by a preponderance of the evidence, that he cannot return to his regular or usual employment due to his work related injury. The Claimant testified that much of his work was overhead and that the work involved frequently climbing stairs and ladders. The majority of opinions of record state that the Claimant should limit stair or ladder climbing. As such, the Claimant is unable to return to his usual employment. Furthermore, Drs. Pavlak, Mainen, and Cain all stated that the restrictions are permanent in nature. Accordingly, I find that the Claimant has established a *prima facie* case of permanent total disability as a result of the 1998 knee injury.

B. HAND, ARM, & SHOULDER INJURY

Based on the medical evidence of record, I find that the Claimant fails to establish that he is totally disabled based on his hand, arm and shoulder injuries.

Wayne McFarland gave the Claimant the following restrictions to begin on March 20, 1995 and to end on June 1, 1995: limited gripping, pushing and pulling. No vibratory tools or overhead work.

Dr. Pavlak diagnosed that the Claimant originally had carpal tunnel syndrome and attributed the residual pain as due to overuse tenosynovitis and some element of medical epicondylitis. He further opined that both of these trauma disorders are likely related to his employment. In addition, he opined that the Claimant is unable to go back to his usual employment. The specific restrictions suggested include: no lifting or carrying of more than 10 pounds on a regular basis and 20 pounds occasionally with the additional restrictions of not repetitive use of the hands, wrists, or forearms, no vibrating or pneumatic equipment, no pushing or pulling. (CX 15)

Dr. Rosquete, in a report dated August 7, 2001, stated that the Claimant's hand and arm pain is aggravated by the use of his power screwdriver, opening and closing the hatches, and pulling on ladders and grabbing things. He opined that the Claimant would benefit from a physically less demanding job or possibly retraining for a desk job.

In contrast, Dr. Mainen, a specialist in occupational injuries, evaluated the Claimant and concluded that despite the prior diagnosis of Carpal tunnel syndrome, that there was no permanent impairment under the 5th Edition of the AMA guides for either upper extremity problem. Dr. Mainen stated that there is no

reason to believe that the Claimant is at risk of harming himself from any physical activity in which he should choose to engage. In fact, in his report, Dr. Mainen stated:

> His carpal tunnel syndrome is obviously resolved. He's had two normal EMGs and I think the probability of his having problems with median nerve compression in the near future is negligible.

(EX 36)

To establish total disability, the Claimant must establish, by a preponderance of the evidence, that he cannot return to his regular or usual employment due to his work related injury. I find that the Claimant is not precluded from his usual employment as a result of his hand and arm injuries. On March 8, 2000, BIW switched which tools would be used by the Claimant in order to try to accommodate the Claimant's restrictions. No evidence has been presented that the job performed was outside his upper extremity restrictions, particularly in light of the additional accommodations made. The Claimant stopped working when BIW failed to provide a job that suited his knee limitations. As such, the Claimant would be able to return to his usual employment based solely on his upper extremity injuries. Accordingly, I find that the Claimant has not established a *prima facie* case of total disability as a result of the hand, arm and shoulder injuries.

C. STRESS/ PSYCHOLOGICAL INJURY

Based on the evidence of record, I find that the Claimant is totally disabled as a result of stress/psychological injury.

The only physician to give an opinion on the Claimant's work capacity in light of his depression is Dr. Bourne. Dr. Bourne specifically states that the Claimant is not psychiatrically able to work or participate in a job search. (EX 38) Dr. Bourne also states that the Claimant's depression and psychological difficulties are long standing. There is no opinion given as to when maximum medical improvement is likely. In the notes taken by Dr. Dettmann, the Claimant has some days where improvement is noted and other days where his well-being has declined.

An injured worker's impairment may be found to have changed from temporary to permanent under either of two tests. Eckley v. Fibrex & Shipping Co., 21 BRBS 120, 122-23 (1998)

Under the first test, a residual disability will become

permanent if, and when, the employee's condition reaches the point of maximum medical improvement. Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984); Rivera v. National Metal and Steel Corp., 16 BRBS 135,137(1984). Thus an irreversible medical condition is permanent per se. Drake v. General Dynamics Corp., Elec Boat Div., 11 BRBs 288, 290 (1979). The Claimant has failed to produce any evidence showing a date where maximum benefit of medical treatment was reached.

Under the second test, a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968). See also Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (D.C. Cir. 1984). In such cases, the date of permanency is the date that the employee ceases receiving treatment with a view toward improving his condition. Leech v. Service Eng'g Co., 15 BRBS 18, 21 (1982). The Claimant argues that his depression is longstanding, thus considered permanent under this second test. However, the Claimant continues to be treated with anti-depressives and counseling with a view toward improving his condition. Accordingly, I find the Claimant temporarily, totally disabled as a result of depression stemming from his work-related injuries.

Suitable Alternative Employment:

Once the claimant makes a *prima facie* showing of total disability, the burden shifts to the employer to rebut this finding. To establish rebuttal, the employer must show suitable alternative employment for the claimant. Clophus v. Amoso Prod. Co., 21 BRBS 261 (1988) Failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. Armfield v. Shell Offshore, Inc., 30 BRBS 122, 123 (1996); American Stevedores, Inc. v. Salzano, 538 F.2 933, 935-936 (2d Cir. 1976); see also Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201(4th

Cir. 1984)(quoting New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1981)).

As evidence of suitable alternative employment, the Employer has offered the testimony of Arthur M. Stevens, Jr., a vocational consultant, as well as a labor market survey which Mr. Stevens compiled. The study was conducted in the greater Fort Fairfield, Presque Isle, and Caribou area.

The Employer's evidence fails to show suitable alternative employment in that it does not take into account the Claimant's depression when it identified allegedly suitable jobs in its labor market survey. Dr. Bourne clearly stated that the Claimant's psychological condition made him unemployable at the present time for psychological reasons alone.

I have found the opinion of Dr. Bourne to be convincing as to the Claimant's work capacity. Dr. Bourne opined that the Claimant is not psychologically ready to resume work or to participate in a job search. If it is determined, based on medical evidence, that the claimant cannot perform any employment, the employer has not established the existence of suitable alternate employment. Lostaunau v. Campbell Indus., 13 BRBS 227 (1981) rev'd on other grounds sub nom. Director, OWCP v. Cambell Indus., 678, F.2d 836, 14 BRBS 974 (9th Cir. 1982), cert denied, 459 U.S. 1104 (1983), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (9th Cir. 1983).

I find Mr. Stevens' testimony and labor market survey inadequate to rebut the presumption of total disability. Accordingly, I find the Claimant totally disabled as a result of his work-related psychological disability.

However, Mr. Stevens has shown suitable alternative employment in light of the Claimant's knee injury. The labor market survey produced twenty-six different jobs are within the Claimant's physical capabilities. Labor market evidence shows that the Claimant could earn at least $6.00 to $8.00 per hour to start in an entry level position. Accordingly, I find that the Employer has rebutted the presumption of total disability as a result of the Claimant's knee injury.

The Board and those circuits which have spoken on this issue are in agreement that total disability becomes partial disability on the earliest date that the employer established suitable alternate employment. Palombo v. Director, OWCP, 937 F.2d 70 (2nd Cir. 1991); Director, OWCP v. Berkstresser, 921 F.2d 306 (D.C. Cir 1990); Stevens v. Director, OWCP, 909 F.2d 1256 (9th Cir. 1990);

Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). Therefore, when the employer has established suitable alternative employment, the claimant is not entitled to permanent total disability benefits, but rather, only permanent partial disability benefits. Since the Employer shows alternate employment beginning March 1, 2002, I find that the Claimant is only entitled to sixty-two weeks of permanent total disability benefits arising out of his knee injury. Following March 1, 2002, the Claimant is only entitled to permanent partial disability benefits arising out of his knee injury.

Average Weekly Wage:

As discussed in detail above, the evidence in the record supports the conclusion that the Claimant has established temporary total disability benefits stemming from his psychological injury from December 13, 2000 through the present and continuing. Based on this ruling, the Claimant is entitled to 66 2/3 percent of the average weekly wages paid to the employee during the continuance of such total disability.

The average weekly wage during the date of the psychological injury has been stipulated at $645.81. In contrast, the average weekly wage during the date of the knee injury has been stipulated at $773.04. The Claimant has shown that factors contributing to the Claimant's depression include his injuries, the way he was treated surrounding his injuries, the resulting financial stress, and the loss of self-worth from being out of work. In light of this causal connection, the date of injury actually stems back to the knee injury. Accordingly, I reject the stipulated average weekly wage relating to the psychological injury. I find that the average weekly wage during the date that the psychological injury occurred is $773.04.

The Board has consistently held that a partial award may not coincide with an award for total disability as total disability presupposes the loss of all wage earning capacity. Mahar v. Todd Shipyards Corp., 13 BRBS 603 (1981); Tisdale v. Owens-Corning Fiber Glass Co., 13 BRBS 167 (1981), aff'd mem. sub nom. Tisdale v. Director, OWCP, 698 F.2d 1233 (9th Cir. 1982), cert. denied, 462 U.S. 1106 (1983). This position has been consistently upheld by the Courts of Appeal to avoid double recoveries. See, e.g., Korineck v. General Dynamics Corp., 835 F.2d 42, 20 BRBS 63 (CRT) (2d Cir. 1987) (a claim for hearing loss benefits is subsumed within an award of permanent total disability benefits for a back injury); Hastings v. Earth Satellite Corp., 638 F.2d 85, 14 BRBS

345 (D.C. Cir.); Jacksonville Shipyards v. Dugger, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979). Accordingly, the Claimant is entitled to only 66 2/3 percent of the average weekly wage maximum of Section 8(a).

Reasonable and Necessary Medical Expenses:

The Employer argues that the Claimant's prescribed use of OxyContin is neither reasonable nor necessary. Dr. Pavlak opines that OxyContin is an appropriate drug to relieve the Claimant of pain. However, he admits that OxyContin use must be carefully monitored because of the side affects associated with the drug, including depression and addiction qualities.

Dr. Mainen and Dr. Bourne both strongly object to the prescription of OxyContin in this case. Dr. Mainen testified that the drug is appropriate only in two circumstances where the cause of pain is known and to aid in controlling end-of-life pain associated with diseases such as cancer. Neither of these situations apply here. Dr. Mainen stressed that OxyContin should not be prescribed in situations involving sufferers of chronic pain syndrome, where the pain is of an uncertain cause. Dr. Bourne agreed, stating he was concerned about the use of narcotics given the chronic nature of the Claimant's pain and the psychological factors involved in this case.

Based on the well-reasoned opinions of both Dr. Mainen and Dr. Bourne, I find that the OxyContin prescription is not a reasonable medical treatment and expense in this case and that the Employer should not be responsible for the costs related thereto. 33 U.S.C. §907(d).

Attorney Fees:

No award of attorney's fees for service to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. The application must conform to 20 C.F.R. § 702.132, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

Entitlement:

The evidence in the record supports the conclusion that Michael J. Kish was temporarily totally disabled from December 13, 2000 to March 1, 2002, and permanently partially disabled from March 1, 2002, through the present and continuing as a result of a work-related knee injury occurring on November 12, 1998. The medical evidence of record further establishes that the Claimant is entitled to temporary total disability from December 13, 2000 to the present and continuing as a result of a stress and psychological injury occurring on November 17, 2000. I find that the Claimant's average weekly wage at the time of both the knee and psychological injury was $773.04.

ORDER

Based on the Findings of Fact and Conclusions of Law expressed herein, IT IS HEREBY ORDERED that:

1. The Employer, Bath Iron Works, shall pay the Claimant compensation for temporary total disability relating to his psychological injury, in the amount of $53,082.07, from December 13, 2000, through the present and continuing, representing the period the Claimant is unable to work due to his disability, based on the Claimant's average weekly wage of $773.04, in accordance with the provisions of Section 908(b) of the Act.

2. The Employer shall pay all reasonable, appropriate and necessary medical expenses arising from the Claimant's work-related knee and psychological injury, pursuant to the provisions of §7 of the Act. I hereby find that the prescription of OxyContin is not reasonable, appropriate, and necessary. Accordingly, the Employer is not responsible for the payment of this prescription.

3. The Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

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DANIEL J. ROKETENETZ
Administrative Law Judge